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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

In the Matter of the Petition of) PCHB No. 92-19
W.T. Withers for a Declaratory)
Order) FINDINGS OF FACT,
) CONCLUSIONS OF LAW AND ORDER

This matter came on for hearing before the Pollution Control Hearings Board,
William A. Harrison, Administrative Appeals Judge, presiding, and Board Members
Harold S. Zimmerman, Judith A. Bendor and Annette S. McGee.

The matter is the petition of W. T. Withers for a declaratory order concerning the
implementation of our order in R/L Associates v. Ecology and Marysville, PCHB No. 90-124
(1991).

Appearances were as follows:

1. Dennis D. Reynolds, Attorney at Law, for petitioner.
2. Michael C. Walter and Timothy L. McMahan, Attorneys at Law, for the City of
Marysville.
3. Rebecca A. Vandergriff, Assistant Attorney General, for State of Washington,
Department of Ecology.

The hearing was conducted at Lacey, Washington, on May 20, 1992.

Gene Barker & Associates provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard
and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

By prior decision we have ruled that:

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB NO. 92-19

(1)

There shall be 940 sewer connections (residential equivalent units) which may be authorized by Marysville from January 31, 1991, until the fulfillment of this Order, as specified in paragraph X.E.6. These 940 connections shall be exempt from any potential sewer ban under this Order. . . . [The term "Order" referred to the Marysville-Ecology Consent Order then on review to which the above language was added by our Order.] The 940 exempt sewer connections should be apportioned according to the sound discretion of Marysville.

R/L Associates, Inc. v. Ecology and Marysville, PCHB No. 90-124 (1991) at Conclusions of Law XVIII and XIX, p. 34.

II

In response to the foregoing, Marysville promulgated, on June 10, 1991, an ordinance apportioning the 940 sewer connections. Ordinance 1846.

III

At Subsections 3.3 and 3.4 of the Ordinance (1846) Marysville granted priority to 940 sewer connections to certain classes of property and persons. See Attachment. Among these are 125 residential lots being developed by W. T. Withers, petitioner herein.

IV

At Subsection 3.6 of the ordinance (1846) it provides as follows:

All properties which are eligible for sewer connections under Section 3.3 and 3.4 above shall complete construction of the connection within 18 months of the effective date of this ordinance, or the right to the connection shall be forfeited. Any connections which are forfeited may be reallocated in such manner as will not exceed the 940 connection limit imposed by the Pollution Control Hearings Board. [...]

V

On January 17, 1992, W. T. Withers filed this petition for a declaratory ruling that ordinance 1846 is in conflict with our prior order in R/L Associates, supra.

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2 VI

3 After this petition was filed, on March 9, 1992, Ecology and Marysville reached
4 agreement on a "Second Amended Consent Order."¹ The Second Amended Consent Order
5 removed the automatic sewer ban which would have engaged when effluent limits were
6 violated. This ban was an element of the First Amended Consent Order pursuant to which
7 ordinance 1846 was promulgated.

8 VII

9 In response to the Second Amended Consent Order, which lacked an automatic sewer
10 ban, Marysville promulgated another ordinance, on March 30, 1992, for apportionment of the
11 940 sewer connections. Ordinance 1883.

12 VIII

13 At Subsection 2.2 of that ordinance (1883) it provides:

14 The Director of the Department of Public Works ("Director") shall grant the
15 940 new sewer connections, reconnections and increases in meter size as
16 referenced in Section 2.1 above, on the same basis and using the same criteria
17 as provided in Sections 3.3 and 3.4 of Ordinance 1846. For purposes of this
18 ordinance, the provisions of Ordinance 1846 pertaining to the allocation of the
19 940 connections in Section 3 thereof and the concept of vested rights as set forth
20 in Section 4 of Ordinance 1846 are adopted by this reference and shall be
21 continued, notwithstanding the repeal of all other provisions of Ordinance 1846,
22 until December 10, 1992. Thereafter, sewer connections shall be available on
23 an equal basis to all applicants who shall meet all prerequisites for approval.

24 IX

25 Ordinance 1846 defined the 18 month period in such a way as to mean December 10,
26 1992, the same date used in Ordinance 1883. By that date under Ordinance 1846, one was

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¹
The original "Consent Order" between Ecology and Marysville was dated May 29, 1990 and was reviewed in R/L Associates, supra. Our order for 940 sewer connections resulted in the "First Amended Consent Order" dated June 18, 1991.

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2 obliged to "complete construction of the connection" to retain priority. Under Ordinance
3 1883, Marysville urges that one must only obtain a building permit and a sewer connection
4 permit. For the reasons which follow, this is largely a distinction without a difference.

5 X

6 The evidence before us is persuasive that at the present time in Marysville, under
7 current economic conditions, developers cannot obtain conventional financing to build a large
8 number of homes on speculation. In this case, therefore, petitioner cannot submit the detailed
9 plans necessary for building and sewer permits without the commitment of an ultimate home
10 buyer. That, in turn, means that homes of a particular design must be sold and on the verge of
11 construction before building and sewer permits can be sought. Neither the petitioner nor other
12 developers currently have a reasonable opportunity to pre-sell homes on 125 lots, and thereby
13 to reach the building and sewer permit stage, by December 10, 1992. The same would be true
14 for any developer, regardless of the total lots to be sold, so long as home pre-sales would need
15 to exceed the reasonable level of five per month.

16 XI

17 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

18 From these Findings of Fact, the Board issues these:

19 CONCLUSIONS OF LAW

20 I

21 It is not an issue before us as to whether the City of Marysville properly exercised its
22 discretion in allocating the 940 connections. See Attachment.

23 The sole issue before us is whether the 18 months (to December 10, 1992) in the
24 ordinances is a reasonable time. We hold that under the current economic climate 18 months
25 is not a reasonable time period. In that respect, Ordinances 1846 and 1883 are in conflict with
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2 our order in R/L Associates, supra, as that time period is not within the "sound discretion" of
3 Marysville.

4 II

5 The 18 month period falls below the amount of time needed for developers with a
6 substantial number of lots to proceed, with due diligence, to a building or sewer permit for
7 each lot. Because the 940 sewer connections ordered in R/L Associates, supra, were based on
8 the interim waste water treatment plant capacity pending expansion, we would deem
9 appropriate any time period which does not expire before the expansion required by the
10 consent orders is complete. Testimony on this record established that expansion is expected to
11 be complete by June, 1993.

12 III

13 Moreover, we observe that there has been presented no evidence that the environment
14 would be benefited by this Ordinance, which might accelerate loading the plant. Upon
15 completion of the treatment plant expansion there is no suggestion that any further sewer ban is
16 contemplated by Ecology. In the interim, however, Marysville and Ecology may by
17 agreement reinstate a ban which by agreement was lifted in 1992 and which by agreement had
18 previously been imposed in 1990. In that event, the priority of certain persons with regard to
19 the 940 connections, as set out in both ordinances 1846 and 1883, would be significant.

20 IV

21 Nothing herein suggests either the need or lack of need for a future sewer ban. That is
22 Ecology's decision and currently the automatic ban has been lifted by Ecology.

23 V

24 Finally, the 940 connections in R/L Associates, supra, were based upon treatment plant
25 capacity. We reiterate our conclusion in R/L that petitioner, Withers, holds no vested right of
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2 sewer connection. Conclusion of Law XIII, p. 31. So long as apportioned with a reasonable
3 time to do what is expected, sewer connections need not be granted to any particular person or
4 persons.

5 VI

6 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

7 From the foregoing, the Board issues this:
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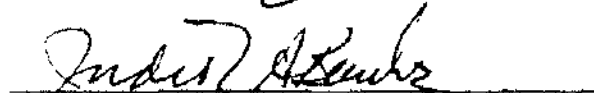
ORDER

The 18 month limitation (to December 10, 1992) of Ordinances 1846 and 1883 are inconsistent with the order in R/L Associates v. Ecology and Marysville, PCHB No. 90-124 (1991).


DONE at Lacey, WA, this 5th day of June, 1992.

POLLUTION CONTROL HEARINGS BOARD


HAROLD S. ZIMMERMAN, Chairman


JUDITH A. BENDOR, Member


ANNETTE S. MCGEE, Member


WILLIAM A. HARRISON
Administrative Appeals Judge

Attachment
P92-19F

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(7) The covenant shall be binding upon the developer, its heirs, successors and assigns. If litigation results from the covenant, the prevailing party shall be entitled to judgment for court costs and reasonable attorney's fees incurred therein.

Section 3. Sewer Connections Exempt from Moratorium.

3.1. As ordered by the Pollution Control Hearing Board on April 26, 1991 under case No. 90-124, there shall be 940 new sewer connections, reconnections or increases in meter size (calculated in terms of residential equivalent units as defined below) to be authorized from January 31, 1991 until fulfillment of the DOE Consent Order under File No. DE 89-N259 as amended. The sewer connections authorized herein shall be exempt from the provisions of Section 2 of this Ordinance and shall otherwise be exempt from any sewer moratorium or any potential moratorium. The term "residential equivalent unit" (REU) shall mean loading equal to that contributed by a sewer connection of an average single-family residence and is equal to 0.6 pounds per day of BOD₅. Unless specifically stated otherwise herein, the term "sewer connection" or "connection" shall mean one REU.

3.2. The Director of the Department of Public Works ("Director") shall grant the 940 new sewer connections, reconnections and increases in meter size using the criteria provided in Sections 3.3 and 3.4 below.

3.3. The following classifications of properties shall each be granted 100% of the sewer connections, reconnections and increases in meter size which have been applied for and approved by the Director:

a. Public buildings and facilities necessary for public health, safety or welfare.

b. All single-family lots with vested rights as defined in Section 4 below.

c. All single-family lots for which sewer plans were approved by the City on or before February 26, 1990, but for which the sewer improvements have not been constructed.

d. All multi-family properties and mobile home parks with vested rights subject to the limitations of Section 4.

e. All Industrial/Commercial properties with vested rights subject to the limitations of Section 4.

f. All Industrial/Commercial properties possessing a valid building permit on which construction was commenced under Ordinance 1763 and which are subject to a ULID established and completed prior to February 26, 1990 and for which SEPA review was completed prior to February 26, 1990, and which were vested under Ordinance 1763 but were restricted under the flow limitations of Ordinance 1795.

g. All other properties within established ULIDs to the extent of their vested connections subject to the limitations of Section 4.

h. All properties for which a variance has been granted pursuant to Section 9.

3.4. All other classifications of properties, whether vested or not, shall each be granted 10% of the sewer connections for which complete development applications were submitted for approval by the City or Snohomish County on or before February 26, 1990, the date of the City's initial sewer moratorium. PROVIDED, however, all short subdivisions for which complete applications were submitted to the City or Snohomish County on or before February 26, 1990 shall be entitled to one new sewer connection. PROVIDED, further, no legal lot or parcel entitled to a connection under this Section 3.4 shall discharge more than 0.6 pounds of BOD₅ per day into the City's sewer system.

3.5. All properties which are entitled to a percentage of the applied-for and approved connections under Section 3.4 above shall be allowed to amend their development application to provide for a phased development project. PROVIDED, a project shall not be phased so as to increase the total number of connections it would otherwise be entitled to under Sections 3.3 or 3.4 above. The City Planning Department is hereby authorized to process an application for phased development administratively. Projects which are subject to the jurisdiction of Snohomish County shall be subject to all applicable rules, regulations and ordinances of the County concerning phased development.

3.6. All properties which are eligible for sewer connections under Section 3.3 and 3.4 above shall complete construction of the connection within 18 months of the effective date of this ordinance, or the right to the connection shall be forfeited. Any connections which are forfeited may be reallocated in such manner as will not exceed the 940 connection limit imposed by the Pollution Control Hearing Board. No application for a sewer connec-